

Bruce C. Fox (*pro hac vice*)
bruce.fox@obermayer.com
Andrew J. Horowitz (*pro hac vice*)
andrew.horowitz@obermayer.com
OBERMAYER REBMANN
MAXWELL & HIPPEL, LLP
525 William Penn Place, Ste. 1710
Pittsburgh, PA 15219
Tel: (412) 566-1500
Fax: (412) 281-1530

Chaka Okadigbo (CA State Bar No. 224547)
cokadigbo@hkm.com
HKM EMPLOYMENT ATTORNEYS LLP
700 S. Flower Street, Suite 1067
Los Angeles, California 90017
Telephone/Facsimile: (213) 431-6209

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

WALLEN LAWSON,

Plaintiff

vs.

PPG INDUSTRIES, INC.,

Defendant.

Case No.: 8:18-CV-00705-JVS-JPR

**PLAINTIFF'S SUR-REPLY IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

The Honorable James V. Selna

Hearing Date: November 7, 2022
Time: 1:30 p.m.
Courtroom: 10C

1 **PLAINTIFF’S SUR-REPLY IN OPPOSITION TO DEFENDANT’S**
2 **MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE,**
3 **PARTIAL SUMMARY JUDGMENT**

4 PPG argues that Lawson’s punitive damages claim fails because Lawson cannot
5 point to “any officer, director, or managing agent” who acted with “oppression, fraud,
6 or malice” ECF No. 95 at 15. PPG’s argument must be rejected.

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8 **I. Legal Standard—Cal. Civil Code § 3294**

9 Punitive damages are available against a corporation based on the conduct of
10 “an officer, director, or managing agent” or where a managing agent has either (a)
11 advance knowledge of, and consciously disregards, the unfitness of an employee or (b)
12 authorizes or ratifies wrongful conduct.¹ Cal. Civ. Code § 3294(b). The scope of an
13 employee’s discretion and authority is “a question of fact for decision on a case-by-
14 case basis.” *King v. U.S. Bank Nat’l Ass’n*, 53 Cal. App. 5th 675, 713 (2020).

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17 Whether an employee is an “officer, director, or managing agent” doesn’t
18 depend on their “level” within the corporate hierarchy; rather, “the critical inquiry is
19 the degree of discretion the employees possess in making decisions that will ultimately
20 determine corporate policy.” *White v. Ultramar*, 981 P.2d 944, 952 (Ca. 1999)
21 (quoting *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 421 (1994)). Thus,
22 “managing agent” includes “[a]n employee exercising authority that results in the ad
23 hoc formulation of policy.” *King* 53 Cal. App. 5th at 714 (citing *Egan v. Mut. of*
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27 ¹ “[R]atification” means “confirmation and acceptance of a previous act” where a
28 managing agent “had actual knowledge of the malicious conduct and its outrageous
character.” *Cruz v. Homebase*, 83 Cal. App. 4th 160, 168 (2000) (citation omitted).

1 *Omaha Ins. Co.* 24 Cal.3d 809, 832 (1979)). An employee is “a true managing agent”
2 if plaintiff shows “that the employee exercised substantial discretionary authority over
3 significant aspects of a corporation's business.” *White*, 981 P.2d. at 954.
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5 **II. Argument**

6 **A. Managing Agents Ratified Moore’s Conduct**

7 Here, managing agents of PPG had advance knowledge of Moore’s unfitness
8 and, moreover, ratified his retaliatory decision to terminate Lawson.
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10 When Lawson blew the whistle on Moore, he set off an investigation of the mis-
11 tinting scheme, which implicated at least two other regional managers, who together
12 with Moore reported to Division Manager Sean Kacsir. *See* ECF No. 94 at 10, 15-16.
13 The mis-tinting fraud cost PPG’s customer, Lowe’s, about \$ 146,000 for Moore’s
14 region alone. *Id.* at 18. The mis-tinting investigation was ultimately national in scope.
15 *See id.* at 17. PPG’s HR managers, Mayhew and Minda—PPG’s Director of HR—
16 were both aware of the mis-tinting investigation, and that the investigation implicated
17 Moore. *See id.* at 25. They, along with Kacsir, were key players in what ultimately
18 amounted to an orchestrated effort to terminate Lawson.
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22 Kacsir was Moore’s supervisor, and exercised oversight with respect to Moore’s
23 implementation of Lawson’s PIP. Given the evidence, including the involvement of
24 three of his regional managers, a jury could find that Kacsir was a ringleader in the
25 mis-tinting scheme, knew that Moore directed his TMs to mis-tint paint, and likely
26 inferred that there had been a whistleblower. *See* ECF No. 94-1 ¶ 57. Kacsir’s odd,
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1 equivocating denial of his involvement, at a minimum, raises credibility issues on this
2 point that cannot be resolved on summary judgment. *See* ECF No. 94 at 17-18.
3 Furthermore, Kacsir participated in the denouement of Lawson’s termination, first
4 deciding (along with Moore and Mayhew) to extend the PIP after Lawson complained
5 to Mayhew about Moore’s conduct, and then directing Moore to conduct the final
6 market walk with Lawson. *See* ECF No. 94-1 ¶¶ 66, 68. That final market walk—
7 which Kacsir attended and which produced a drastically lower score—was the final
8 justification needed to terminate Lawson. *See* ECF No. 94 at 21. In other words,
9 Kacsir, like Moore, had motive to retaliate against Lawson and took steps to ensure
10 there was an adequate paper trail. Thus, a reasonable jury could discredit Kacsir’s
11 testimony and find that he, in coordination with Mayhew, ratified Moore’s retaliatory
12 firing of Lawson.
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17 Next, Minda knew, at a minimum, that the investigation grew out of an
18 anonymous report from Moore’s region. *See* ECF No. 94 at 25. And, in a tacit
19 acknowledgement of Moore’s misconduct, Minda eventually (and belatedly) issued
20 Moore a formal written warning against penalizing TMs for “not mis-tinting”—a
21 practice of Moore’s that helped generate Lawson’s low market walk scores. *See* ECF
22 No. 94 at 12, 19. Mayhew, for his part, received direct complaints from Lawson about
23 the unfairness of his market walk scores and Moore’s continuous failure to hold up his
24 end of the PIP. *See id.* at 20-21. Yet, in August 2017, when Moore requested
25 Lawson’s termination, Mayhew and Minda both signed off without question. *See id.* at
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1 25. Indeed, Mayhew abruptly ended Lawson’s termination meeting—exclaiming,
2 “this meeting is over, I’m hanging up now”—after Lawson accused Moore of stealing
3 from Lowe’s. *Id.* at 26.
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5 This evidence, which must be taken as true and construed in Lawson’s favor at
6 summary judgment, shows that Minda—who, as Director of HR, is unquestionably a
7 “managing agent”—knew (1) about Moore’s unfitness; (2) that an anonymous report
8 from Moore’s region launched the mis-tinting investigation; and (3), through Mayhew
9 and her HR oversight function, about Lawson’s complaints about Moore’s
10 implementation of the PIP. But Minda didn’t take *any* action to protect Lawson;
11 instead, she rubber-stamped his termination. This evidence would permit a jury to
12 find that Minda ratified Moore’s retaliation against Lawson.
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16 In sum, the evidence here would permit a jury to conclude that both Kacsir and
17 Minda ratified Moore’s conduct. Two further points buttress this conclusion. First, it
18 is notable that Moore received nothing more than a belated written reprimand from
19 Minda and was rewarded with a job managing a PPG. *See* ECF No. 94 at 19. Second,
20 PPG never informed Lowe’s of the fraud. As such, a reasonable jury could conclude
21 that Lawson’s termination was part of a cover-up that included Minda and Kacsir.
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24 **B. Moore Was a Managing Agent.**

25 Next, PPG asserts that “Plaintiff has no evidence either [Moore or Mayhew]
26 were an officer or managing director.” ECF No. 95 at 15. But the evidence shows
27 that Moore exercised considerable discretion and authority regarding Lawson’s firing,
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1 resulting in ad hoc policy-making, and rendering him a “managing agent” here. *King*,
2 53 Cal. App. 5th at 714 (citing *Egan* 24 Cal.3d at 832 (1979)).

3
4 Like like the supervisor in *White*, Moore oversaw a “significant aspect” of
5 PPG’s business: he oversaw fourteen TMs, each of whom was responsible for multiple
6 Lowe’s stores—Lawson alone dealt with ten or eleven Lowe’s stores.² *See* ECF No.
7 94 at 10; *see also White*, 981 P.2d. at 954. Next, although Moore consulted with
8 Mayhew on whether to put Lawson on a PIP, the decision was ultimately Moore’s. *See*
9 ECF No. 94-1 ¶ 21. And, despite Lawson’s direct complaints to Mayhew about the
10 way Moore implemented the PIP, there is little evidence that Mayhew did anything to
11 correct Moore’s activities. *See* ECF No. 94 at 20.

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14 Mayhew’s lack of oversight allowed Moore to create ad hoc policy, preventing
15 Lawson from successfully completing his PIP. Moore awarded Lawson zero points in
16 multiple market walk categories with no good explanation. *See id.* at 22. He docked
17 Lawson points contrary to PPG policy. *See id.* He reassigned Lawson to
18 underperforming stores and removed Lawson from high-performing stores. *See id.* at
19 23. Moore accused Lawson of falsifying training rosters, despite having no evidence
20 that Lawson deliberately did so. *See id.* at 24-25. Although PPG, like the defendants
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25 ² PPG’s reliance on *Cruz*, 83 Cal. App. 4th at 167-68, on this point is misplaced. In *Cruz*, the
26 supervisor in question “was not a manager of numerous stores, but only a supervisor subordinate to
27 the store manager in a single outlet of a multi-store chain. He supervised only a few employees, and
28 had authority over only one narrow area of the single store’s multi-faceted operations: security.”
Moore, on the other hand (not to mention Minda, Mayhew, and Kacsir, discussed above) sat over
more than a dozen TMs, each of whom managed PPG’s affairs with numerous Lowe’s locations.
And, Moore had more general authority over his TMs.

1 in *White* and *King*, attempts to paint Moore as a low-level manager with little or no
2 discretion, a jury could conclude that Moore exercised the kind of ad hoc policy
3 making discretion necessary under § 3294(b) for him to be considered a “managing
4 agent.” *See White*, 981 P.2d. at 954; *King*, 53 Cal. App. 5th at 713-14.

6 The evidence further shows that Moore’s conduct was retaliatory. Whether
7 malice, fraud, or oppression—or all three, *see Cunning v. Skye Bioscience, Inc.*, No.
8 SA CV 21-00710-DOC-KES, 2022 U.S.Dist.LEXIS 153711, at *22 (C.D.Cal. July 28,
9 2022) (defining oppression, fraud, and malice under § 3294)—Moore’s decision to put
10 Lawson on a PIP and then to ensure that Lawson could not succeed shows the kind of
11 callous disregard required under § 3294. A reasonable jury could conclude such
12 conduct warrants punitive damages against PPG.

16 **III. Conclusion**

17 PPG’s Motion for Summary Judgment as to punitive damages should be denied.

20 Dated: October 24, 2022

Respectfully submitted,

21 /s/Andrew J. Horowitz, Esq.

22 Andrew J. Horowitz, Esq.

23 *Attorneys for Plaintiff Wallen Lawson*

CERTIFICATE OF SERVICE

I, Andrew J. Horowitz, hereby certify that the within Brief has been served on all counsel of record this October 27, 2022, via the Court's CM/ECF filing system.

/s/Andrew J. Horowitz, Esquire